

ESTABLISHING RAILROAD LIABILITY FOR FIRES

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INTRODUCTION

An action against a railroad company for damage caused by fires started or set out along or near the right-of-way by locomotives raises questions concerning which no little confusion has crept into the cases. A great deal of the difficulty arises out of a failure to recognize the theories upon which such actions, under modern statutes, are brought, and the kind and effect of the various presumptions that arise with respect to the issues involved. Many cases eventually result in erroneous decisions because counsel, failing to invoke the proper presumptions, neglect to demand such rulings of the judge as they are entitled to under the law. Juries not infrequently are permitted to return verdicts when, as a matter of law, the case should never have gone to the jury in the first place.

In cases which the juries may properly consider, they are not always to blame for verdicts contrary to the rights of the litigants. Often causes involving responsibility for railroad fires hang exclusively upon circumstantial evidence. Erroneous instructions by the court on the necessary amount and nature of this kind of evidence sometimes put upon one or the other party a burden difficult or impossible to sustain and one not at all warranted by law, with the result that the jury may be constrained to find in a way contrary to that which would have been permissible had accurate instructions been given. Both counsel and court have gone astray on these phases of such cases, and it is to them that failure to obtain correct results is many times attributable.

At the outset it must be noticed that there are usually two distinct issues involved in the evidence: (1) the issue of the origin or cause of the fire, that is, whether or not the defendant's locomotive actually started the conflagration; and (2) the issue

of negligence, where such is a factor in liability. The problems raised by the various presumptions applicable to these two issues are distinct and in many cases quite different. At all stages of the proceedings, the evidence tending to prove the one or the other of these issues as well as proof tending to rebut such evidence must be differentiated. A few considerations in regard to circumstantial evidence will be found pertinent at this point of the inquiry.

CIRCUMSTANTIAL EVIDENCE

In most cases of this nature, the plaintiff must rely almost exclusively upon circumstantial evidence to prove both origin of the fire and the defendant's negligence.¹ Not infrequently the mass of circumstantial evidence on the whole case will be contradictory and conflicting. What amount and quality of such evidence is required of the plaintiff to establish liability? There must be some general standard by which to measure the evidence to determine whether or not it is sufficient to satisfy the judge that there are issues of fact to submit to the jury. In addition there should be some general standard or guide for the jury to employ to determine whether or not the party who has the burden of proof has sustained it. The ultimate end of the law must be to develop rules and standards to govern these situations which are workable and which produce desirable social results.

As to the plaintiff's evidence showing the defendant's causal connection with the fire, it has been said that the circumstantial evidence offered by the plaintiff must be of such a character as to be consistent only with the defendant's responsibility; that is, that all other reasonable explanations should be negated. On the other hand, it is not necessary, it is declared, for the plaintiff's evidence to exclude all other *possibilities* of another origin. It is sufficient if the facts and circumstances fairly warrant the conclusion that the fire did not originate from some other cause.² The former test is obviously different from the latter,

¹ Cf. *Wolff v. Chicago, M. & St. P. R. R.*, 34 Minn. 215, 25 N. W. 63 (1885).

² *Moose v. Missouri, K. & T. of Texas*, 212 S. W. 645 (Tex. Comm. App. 1913); *Chicago, R. I. & P. R. R. v. National Fire Ins. Co.*, 151 Ark. 218, 235 S. W. 1006 (1921).

for here the plaintiff's evidence should merely be such as to warrant the conclusion that the plaintiff's engines did start the fire.³ But the stricter rule requires much more. It demands from the reasonable mind the conclusion that it was so unlikely that there was any different origin that, in the absence of further evidence, but one explanation is reasonably available. The mere probability that the fire was started by a locomotive, it is said, is insufficient.⁴

If this is the effect of the above test, there are other standards that commend themselves as more desirable guides to the sufficiency of proof required to support a verdict. Social justice demands a standard which will relieve the plaintiff from such a high degree of proof. That standard may be extricated from holdings which permit the jury, on the issue of fact as to origin, to choose, from several reasonable hypotheses appearing from the evidence, that one which in its best judgment is the more reasonable and probable, thus permitting it to adopt the hypothesis that sparks were communicated from the defendant's locomotive, although the evidence adduced to support that hypothesis is not such as to negative every other possible or reasonable origin.⁵

³ Cf. Allen, J., concurring, in *Springfield Fire & Marine Ins. Co. v. Lusk*, *infra* note 5; *Frame v. Kansas City, C. & S. R. R.*, 209 S. W. 314 (Mo. 1919) *semble*. In this case the court has avoided one fallacy, but immediately falls into a greater one. In reviewing the finding below it was said, at 318: "All the cases agree that liability may be established by circumstantial evidence, and the rule is that it is sufficient to take the case to the jury if such evidence shows both a reasonable possibility of the fire being communicated by sparks from the engine and that such is the most probable and reasonable source of its origin. This is the test of whether the case should be submitted to the jury, and in no way conflicts with the rule that the jury must find from the evidence that the fire did in fact originate from that source. The one rule defines the province of the court and the other that of the jury. *Taylor v. Lusk*, *supra* (194 Mo. App. 133, 187 S. W. 87 [1916]). So also it is generally the province of the jury in weighing the evidence to apply the rule of circumstantial evidence that, in order to make a case by such evidence, the circumstances must not only be consistent with the finding that such was the origin of the fire, but must exclude every other reasonable hypothesis. *Fritz v. Railroad*, 243 Mo. 63, 77, 148 S. W. 74."

It is necessary, of course, to distinguish between the test which the court must apply to determine the sufficiency of the evidence and the actual findings made by the jury. But there cannot be one test for the trial court and another for the court of review, the latter based upon the test which the jury employed or should have employed in passing upon the evidence.

⁴ *Sheldon v. Hudson R. R.*, 29 Barb. 226 (N. Y. 1859).

⁵ *Springfield Fire & Marine Ins. Co. v. Lusk*, 205 Mo. App. 185, 223 S. W. 804 (1920); *Baltimore & O. R. R. v. Shipley*, 39 Md. 251 (1873); cf. *State ex rel. Detroit, etc., Ins. Co. v. Ellison*, 268 Mo. 239, 187 S. W. 23 (1916).

Thus it has been said by the Oklahoma court that "circumstantial evidence in a civil case, in order to be sufficient to sustain a verdict need not rise to that degree of certainty which will exclude every reasonable conclusion other than the one arrived at by the jury." ⁶ With respect to negligence, the Iowa court has put it thus:

"The case so made is not to be disposed of by the suggestion that other reasonable theories may be advanced to explain plaintiff's injury. Even in a case depending on circumstantial evidence alone to establish negligence, the plaintiff is not bound to negative every other conceivable theory or hypothesis which ingenuity may invent to account for his injury. It is only where opposing theories are equally reasonable and equally consistent with the proved or admitted facts that plaintiff must fail as a matter of law." ⁷

In Pennsylvania, however, it appears that the strict rule as to proof of origin of the fire is observed.

"The causal connection must be complete, not admitting of other possibilities. If the evidence is not sufficient to establish this connection, the court should so declare as a matter of law." ⁸

⁶ *Schaff v. Coyle*, 121 Okla. 228, 231, 249 Pac. 947, 950 (1926).

⁷ *Gordon v. Chicago & R. I. R. R.*, 146 Iowa 588, 594, 123 N. W. 762, 764 (1909). But *cf.* *Asback v. Chicago, B. & Q. R. R.*, 74 Iowa 248, 37 N. W. 182 (1888). In any event, the various circumstances must be considered as a whole rather than each one separately. "An examination of the precedents referred to will readily demonstrate that in no instance have we gone further than to hold that, where proof of the alleged negligence and the resulting injury rests solely upon circumstantial evidence, and the proved circumstances when taken as a whole and fairly considered are consistent with the exercise of due care on the part of the defendant, the plaintiff cannot recover. To say, however, that each particular circumstance constituting the array of evidence upon which the plaintiff relies may be taken separately and subjected to that test, and that if it be found consistent with any other theory than that of negligence its value is destroyed, is an altogether different proposition. And this, it appears to us, is the vice of the charge given by the trial court. It takes up one by one the various alleged circumstances shown upon the part of plaintiff and tells the jury that, if such happening is one which 'might' have occurred from some other cause than the negligence charged, it must be disregarded as without probative weight and value in reaching their verdict. It is scarcely too much to say that, if this rule is to be approved, no case, civil or criminal, can ever be established by circumstantial evidence." *Bryce v. Chicago, M. & St. P. R. R.*, 129 Iowa 342, 348, 105 N. W. 497, 499 (1906).

⁸ *Kalback v. Philadelphia & R. R. R.*, 277 Pa. 307, 311, 312, 121 Atl. 204, 205 (1923).

The best and simplest standard here seems to be whether or not the circumstances make it probable and are such as to justify a reasonable inference that the fire was caused by the defendant's locomotive.⁹ On this issue, surely it should not be necessary for the plaintiff to prove that the fire by which his property was destroyed could not have been started in any other way than from sparks from the defendant's locomotive, and reputable courts have so declared.¹⁰ But while we may reject the test which compels the plaintiff to establish causal connection beyond a reasonable doubt,¹¹ it must still be remembered that here he has the burden of proof, in consequence of which, where the evidence shows that there was as great a likelihood that the fire started from the plaintiff's own acts as from the defendant's causal connection with the fire, the jury cannot find for the plaintiff. The defendant, in fact, is entitled to a verdict if the inferences on the whole of the evidence are equal, on the ground that the plaintiff's proof does not show a preponderance of evidence.¹² The mere possibility, however, that the fire may have occurred in some other way is insufficient to rebut a reasonable inference from all the facts that the defendant's locomotive started it.¹³ The same general test may be properly applied in the first instance to the evidence on the issue of negligence.

If the plaintiff makes out a *prima facie* case, in the absence of material rebutting evidence, he will, of course, get to the jury. What specific facts and combinations of circumstances are necessary to make out this so-called "*prima facie* case"? What is the effect of this and other stronger presumptions on both major issues? These are the practical questions involved, a correct answer to which demands an accurate and rational theory of burden of proof and of presumptions.

⁹ *Kansas City, etc., R. R. v. Perry*, 65 Kan. 792, 70 Pac. 876 (1902); *Foster v. Missouri P. R. R.*, 143 Mo. App. 547, 128 S. W. 36 (1910).

¹⁰ *Monte Ne. R. R. v. Philipps*, 80 Ark. 292, 96 S. W. 1060 (1906); *Kansas City, etc., R. R. v. Perry*, *supra* note 9.

¹¹ *Cf. Burke v. Louisville & N. R. R.*, 7 Heisk. 451, 461, 462 (Tenn. 1872); *Baltimore & O. R. R. v. Shipley*, *supra* note 5.

¹² *Bates Co. Bank v. Missouri P. R. R.*, 98 Mo. App. 330, 73 S. W. 286 (1903).

¹³ *Kelley v. Wabash R. R.*, 151 Mo. App. 307, 131 S. W. 718 (1910).

PRESUMPTIONS IN GENERAL

A failure to clearly distinguish between the particular presumptions raised at different stages of the proof may very well account for the lack of agreement as to their effect which has always been so noticeable in the cases. Courts frequently use the expression "*prima facie* case" and the term "presumption" synonymously;¹⁴ and this is accurate enough providing the proper kind and the same presumption is always intended.¹⁵ By a *prima facie* case, we understand one that affords evidence sufficient in probative value to warrant the jury in reasonably returning an affirmative verdict on the issue involved, in the absence of any rebutting evidence. When a litigant has made out a *prima facie* case, he is assured of getting to the jury provided no evidence is offered by his adversary, and nothing more. In other words, he is safeguarded against a directed verdict or an involuntary nonsuit at that particular stage of the trial.¹⁶

But the jury is not required, as a matter of law, to find in favor of the party making out a *prima facie* case. It is warranted, but not compelled, to make such a finding. If the plaintiff has made out such a case, with no further presumption to aid him, he may still fail to get an affirmative verdict as a result of his failure to sustain or satisfy his burden of proof.¹⁷ Consequently there can be no directed verdict either way and there is presented a question which if, there be no further evidence, must be passed upon by the jury. Now the question as to whether the plaintiff has sustained the burden of proof will be decided solely by the jury, and their verdict will indicate the result. It will be seen, of course, that a *prima facie* case in this sense is, strictly speaking, no presumption at all. It has been called a

¹⁴ For example, *Howard v. Chicago B. & Q. R. R.*, 196 Iowa 1378, 195 N. W. 153 (1923).

¹⁵ See *In re Locust Building Co.*, 299 Fed. 756, syl. 5 (C. C. A. 2d, 1924).

¹⁶ For different uses of the expression "*prima facie*," see *In re Sanger*, 169 Fed. 722, 724 (N. D. W. Va. 1909) (throwing burden of proof upon adversary); *Rex v. Almon*, 5 Burr. 2686 (1771) (throwing burden of producing evidence upon adversary); *Regina v. O'Doherty*, 6 State Trials (N. S.) 831 (1848) (the meaning adopted in the text).

¹⁷ By failing to get his affirmative verdict, we regard the plaintiff as failing to sustain the burden of proof.

"permissible inference,"¹⁸ but since the immemorial usage of common law courts has designated it a presumption, it will be referred to in the subsequent pages as presumption number one.

Another type of situation which occasionally arises in proving liability of a railroad for a fire is that which imposes upon one or the other party the duty of coming forward with some kind of evidence in rebuttal. A presumption is said to arise from proof of facts which are to be regarded as establishing the existence of certain other facts, unless the adversary can throw doubt upon the inference by coming forward with evidence showing a likelihood or possibility that the inferred facts do not, in truth, exist.¹⁹ The basis of this presumption is, of course, the reasonableness of the inference in the light of the common experience of mankind; that experience has indicated that a certain group of facts is usually the result or the cause of certain other facts or groups of facts sought to be proved. Doubt must be cast upon the reasonableness of such causal relationship, in a particular case, by rebutting evidence, or it must be taken by the jury as true.²⁰

It will be noticed that the fact or facts to be inferred here are operative facts, or those which entail some kind of legal consequences.²¹ The fact or facts upon which the inference rests or from which the presumption arises are evidentiary facts.²² The causal relationship which usually exists between these operative facts and the evidentiary facts, as established by common observation and experience, furnishes the basis and explanation of the so-called presumption. It is a device of expediency which the common law has crystallized into concrete rules of law to make possible convenient proof of operative facts from evidentiary facts which, for practical purposes, amount to common and particularized groups or bits of circumstantial evidence.

Since, then, we have a situation here which is said to throw

¹⁸ Cf. 5 WIGMORE, EVIDENCE (2d ed. 1923) § 2490, n. 1.

¹⁹ 5 WIGMORE, *op. cit. supra* note 18, § 2486.

²⁰ 5 WIGMORE, *op. cit. supra* note 18, § 2491.

²¹ For a discussion of "operative" facts, see HOFELD, FUNDAMENTAL LEGAL CONCEPTIONS (Cook's ed. 1923) 32.

²² Cf. 5 WIGMORE, *op. cit. supra* note 18, § 2491.

upon the adversary the duty of coming forward with something by way of explanation to refute the inference, a failure to do so immediately subjects him to an adverse ruling by the court. In other words, it is the court's duty, if requested, to direct a verdict against the party failing to sustain this burden. As soon as the adversary has offered his rebutting evidence, however, he has thrown doubt upon the existence of the operative facts to be inferred, and he is thereby protected from an adverse ruling by the court, and entitled to have the jury pass upon the issue and the evidence as a whole, with proper instructions as to the burden of proof. This presumption is referred to as presumption number two.²³

Finally, there is the situation which may be said to raise a presumption in favor of the party who does not have the burden of proof. This merely means that certain facts are presumed, by law, to be true until the contrary is proved by the weight of evidence. If the adversary presents no evidence whatever, the party in whose favor the presumption exists is entitled to a directed verdict.²⁴ Even if the adversary presents some evidence, there may still be a verdict directed against him, for his evidence may be insufficient to justify reasonable men in finding in his favor. He has had a duty to present evidence of a certain minimum weight to overcome a presumption, and unless he satisfies that burden with a substantial amount of evidence, except in jurisdictions where the scintilla rule obtains, he is liable to a ruling against him by the judge. This presumption, for convenience, may be identified as presumption number three.²⁵ With these distinctions in mind, we may look at the function of presumptions in actions against railroads for fires.

PRESUMPTION OF NEGLIGENCE

The theory of most, but not all, actions against railroad companies for damage caused by fires, is that the fire was due to

²³ For this scheme of identifying presumptions, see Fowler V. Harper and Heckel, *The Scope and Effect of the Doctrine of Res Ipsa Loquitur* (1928) 22 ILL. L. REV. 724, 729-731.

²⁴ WIGMORE, *op. cit. supra* note 18, § 2487 (a).

²⁵ Harper and Heckel, *supra* note 23, at 730, *et seq.*

the negligence of the company in the maintenance or operation of its equipment.²⁶ In some jurisdictions there is no presumption whatever to aid the plaintiff in establishing liability.²⁷ This does not mean that he may not make out his case and, perhaps, recover, upon circumstantial evidence alone. It does mean, however, that he does not have the advantage of particular rules making certain definite combinations of facts of sufficient probative value, as a matter of law, to carry with it a clear and recognizable advantage in the lawsuit. But in many, if not most, jurisdictions, by statute or otherwise, negligence is presumed from the fact that property was destroyed by reason of a fire started from the company's engines.²⁸

Some courts have insisted that legislative enactment was necessary for the application of such a presumption,²⁹ while others have thought that the presumption could be applied in the absence of statute, it having sufficient authorization in the common law.³⁰ Thus one court has declared that the doctrine of *res ipsa loquitur*, if it were not immediately applicable, at least offered a direct and persuasive analogy.³¹ Another court, however, is just as confident that "the rule cannot rest upon the doctrine of *res ipsa loquitur*, for there is no probable connection between the falling of a spark from a locomotive and negligence as

²⁶ See the discussion by the court in *Wallace v. New York, N. H. & H. R. R.*, 208 Mass. 16, 94 N. E. 306 (1911).

²⁷ *Louisville & N. R. R. v. Haggard*, 161 Ky. 317, 170 S. W. 956 (1914). See also cases cited in 33 Cyc. 1364. The federal courts have stubbornly clung to this rule, declaring it "the more logical view." *Examine General Ins. Co. of America v. Northern P. R. R.*, 28 F. (2d) 574 (1928), and cases cited in the opinion.

²⁸ *Louisville & N. R. R. Co. v. Studdard*, 34 Ga. App. 570, 130 S. E. 532 (1925); *Missoula Trust & Savings Bank v. Northern P. R. R.*, 76 Mont. 201, 245 Pac. 949 (1926); *Tilley v. St. Louis & S. F. R. R.*, 49 Ark. 535, 6 S. W. 8 (1887); *Union P. R. R. v. Arthur*, 2 Colo. App. 159, 29 Pac. 1031 (1892); *Jones v. Michigan C. R. R.*, 59 Mich. 437, 26 N. W. 662 (1886); *Anderson v. Wasatch & J. V. R. R.*, 2 Utah 518 (1881). Examine cases in 33 Cyc. 1361, 1362. See also 2 THOMPSON, NEGLIGENCE (2d ed. 1901) § 2284. For discussion and collection of authorities on this presumption, see notes in (1913) 30 Ann. Cas. 968; (1910) 16 Ann. Cas. 879; (1882) 38 Am. Dec. 64; (1895) 42 Am. St. Rep. 530; (1906) 1 Ann. Cas. 812.

²⁹ *Wallace v. New York, N. H. & H. R. R.*, *supra* note 26.

³⁰ *Cronk v. Chicago, M. & St. P. R. R.*, 3 S. D. 93, 52 N. W. 420 (1892); *Ellis v. Portsmouth, etc., R. R.*, 2 Ired. L. 138 (N. C. 1841); *Burke v. Louisville & N. R. R.*, *supra* note 11.

³¹ *Southern R. R. v. Dickens*, 161 Ala. 144, 49 So. 766 (1909).

is required for the application of that doctrine.”³² Regardless of this difference of opinion, as to theory, the majority of states have adopted the rule that some kind of presumption is raised either by reason of, or in the absence of, statutory authority.³³

Now if there is a presumption of negligence, it is important to know whether it is presumption number one, number two, or number three. If it be presumption number three, it means that the defendant has the burden, not merely of coming forward with evidence of due care, but of proving by a preponderance of the whole evidence that it was guilty of no negligence in this respect.³⁴ The defendant, rather than the plaintiff, must assume the risk of non-persuasion on the issue of negligence. In other words, as soon as the plaintiff has proved that his property was destroyed by a fire set out by a railroad locomotive, the burden of proof is upon the defendant to prove that he has employed due care, and he must get a verdict from the jury in his favor on this issue.³⁵

This is very clearly the presumption in some states. As ably set forth by Judge Mitchell in a Minnesota case:

“This statute, in our opinion, establishes the same rule which has been established by similar statutes in a number of other states, and which has been by many courts held to be a common law principle, in the absence of statute, viz., that where damage is caused by fire which is proven to have escaped from the engine of a railroad company, a presumption of negligence on the part of the company arises which casts

³² *Wallace v. New York, N. H. & H. R. R.*, *supra* note 26, at 19, 94 N. E. at 307; *cf. Byrne v. Boadle*, 2 H. & C. 722, 728 (1863) (where Pollock, C. B., in a leading *res ipsa* case, thought that a barrel “could not roll out of a warehouse without some negligence”).

³³ See numerous cases collected in the note (1906) 1 Ann. Cas. 812.

³⁴ See 33 Cyc. 1361-1364.

³⁵ “From the practical viewpoint, the situation does not involve a shifting of the burden of proof. The plaintiff assumed the burden of proving negligence only as he is required to prove the fire, and that it was caused by defendant; whereas, from the beginning, the burden is on the defendant to make affirmative proof that it was in the exercise of due care.” *Stewart v. Iowa Central R. R.*, 136 Iowa 182, 186, 113 N. W. 764, 765 (1907). Accordingly, “if defendant admits that the fire was caused by sparks from its locomotive and pleads facts indicating lack of negligence its plea is in effect a plea of confession and avoidance, and it therefore assumes the burden of proof.” 33 Cyc. 1364; *cf. Illinois C. R. R. v. Barrett*, 23 Ky. L. Rep. 1755, 66 S. W. 9 (1902); Bohlen, *The Effect of Rebuttable Presumption of Law Upon the Burden of Proof* (1920) 68 U. of Pa. L. Rev. 307, 319 (as to the presumption “shifting” the burden of proof).

the *onus* or burden of proof upon the railroad company to show affirmatively that they were not guilty of any negligence . . .

"The effect of the statute is that where it is established that the fire causing the damage was scattered or thrown from the company's engine, the burden of proof is cast upon the company to show affirmatively that it did its duty in the premises, and was not in fact guilty of any negligence. This it must do by satisfactory evidence, as in any case where a party holds the affirmative of an issue, or where the burden of proof is cast upon him."³⁶

It is clear here what the force of the presumption must be, at different stages of the proof. If the defendant offers no evidence of due care whatever, the plaintiff, on proving the facts raising the presumption, is undeniably entitled to a directed verdict.³⁷ In case the defendant offers slight but by no means satisfactory proof of due care, he is still liable to a directed verdict, in all jurisdictions denying the scintilla rule, for as a matter of law he has not sustained the burden which the presumption threw upon him.³⁸ A failure to direct a verdict against him under these circumstances is error. Even if the evidence presented by the defendant were strong enough to evenly balance the plaintiff's proof, the jury must find for the plaintiff and instructions to such effect must be given.

But many courts have attributed only presumption number two to the circumstance that the railroad company set out or scattered the fire. Thus it has been said that "strictly and technically, it is probably true that a so-called 'statutory presumption' does not change the burden of proof, but merely determines the right to a verdict if no other evidence is introduced."³⁹ Again, it was said by the same court:

³⁶ *Karson v. Milwaukee & St. P. R. R.*, 29 Minn. 12, 14, 15, 11 N. W. 122, 123 (1881).

³⁷ *Missouri, K. & T. R. R. v. Prickryl*, 26 S. W. 855 (Tex. Civ. App. 1894); *Missouri, K. & T. R. R. v. Kelley*, 30 S. W. 486 (Tex. Civ. App. 1895).

³⁸ *Cf. Stewart v. Iowa Central R. R.*, *supra* note 35; and language employed in *German Ins. Co. v. Chicago & N. W. R. R.*, 128 Iowa 386, 390, 391, 104 N. W. 361, 363 (1905).

³⁹ See *Howard v. Chicago B. & Q. R. R.*, *supra* note 14, at 1383, 195 N. W. at 155.

"We have uniformly held . . . that plaintiff made a *prima facie* case by proving . . . that the fire originated from the operation of a railroad . . . and we have frequently declared that where such a *prima facie* showing was made, the burden or duty rested upon the railroad company to make proof of its freedom from negligence."⁴⁰

Now the defendant is not required to get an affirmative verdict upon the issue of negligence. He must come forward with some evidence or lose,⁴¹ but he is not required to convince the jury affirmatively that he has used due care. If the evidence is evenly balanced, the jury is bound to find for him.⁴² If the defendant offers evidence, however slight, to meet the plaintiff's presumption, it is sufficient to insure to the defendant that his case will go to the jury. He has met the only burden that was cast upon him by at least introducing evidence tending to throw doubt upon the question of negligence. By thus raising a doubt, he destroys the legal effect of the plaintiff's presumption and the case must go to the jury as any other *doubtful* issue, to pass upon the circumstantial evidence as a whole.⁴³

Few courts have held that the presumption raised in the plaintiff's favor is less than number two, *i. e.*, that it amounted

⁴⁰ *Supra* note 14, at 1384, 195 N. W. at 155. "To make proof" here apparently means to come forward with evidence. In some of the Iowa cases, it has a different meaning. The older cases are not at all consistent with later decisions as to the force and effect of the presumption. *Cf.* this case with *Stewart v. Iowa Central R. R.*, *supra* note 35; *German Ins. Co. v. Chicago & N. W. R. R.*, *supra* note 38; *Small v. C. R. I. & P. Ry.*, 50 Iowa 338 (1879); *Engle v. Chicago, M. & St. P. R. R.*, 77 Iowa 661, 37 N. W. 6 (1888).

⁴¹ "Even when the plaintiff has made out a *prima facie* case, the burden of proof does not always shift to the defendant in any proper sense. All that is meant by such an expression is that the other party must go forward with his proofs, if he would not have judgment against him. . . . It is clearly a misnomer of terms to say that the burden of proof swings like a pendulum from one side to the other, during the progress of a trial. All that is meant is that the duty of introducing evidence to meet a *prima facie* case shifts back and forth." *Gibbs v. Farmers & Merchants Bank*, 123 Iowa 736, 741, 742, 99 N. W. 703, 705, 706 (1904).

⁴² *Shipman v. Chicago, B. & Q. R. R.*, 78 Neb. 43, 110 N. W. 535 (1907); *Toledo, St. L. & W. R. R. v. Star Flouring Mills Co.*, 146 Fed. 953 (C. C. A. 6th, 1906). *Cf.* the analogous situation created under the presumption produced by *res ipsa loquitur* in *Scellers v. Universal Service Co.*, 68 Cal. App. 252, 228 Pac. 879 (1924); cited in *Harper and Heckel*, *supra* note 23, at 746, n. 126. *Cf.* also *Missouri K. & T. Ry. v. Morgen Bros.*, 146 S. W. 336 (Tex. Civ. App. 1912), 193 S. W. 134 (Tex. Civ. App. 1917).

⁴³ See *Heimi v. Chicago G. W. R. R.*, 102 Iowa 25, 28, 70 N. W. 746, 748 (1897); *cf.* 33 Cyc. 1364, n. 44.

to no more than a *prima facie* case, in the narrowest sense, sufficient only to carry the case to the jury if there were no further evidence by either party. The language, however, is by no means clear in many instances, and one must frequently look to the results to determine what theory of presumption has actually been employed.

It is, indeed, a sorry situation when the courts hopelessly confuse the presumptions as to negligence, or when they regard the difference between presumption number two and presumption number three as purely academic or of no "practical" importance.⁴⁴ Thus we may find the singular phenomenon of a trial court nicely instructing the jury as to presumption number three, clearly and unequivocally throwing upon the defendant the burden of proof as to negligence, while the appellate court expends eloquence and learning to show that the law of the state allows only presumption number two here—though affirming the decision below because the instruction was not prejudicial.⁴⁵

⁴⁴ "Counsel on either side have gone deeply into discussion of the law with respect to the force and effect of presumptions in the trial of an issue of fact. We deem it unnecessary, in this case, to attempt any final answer to this more or less vexed question, upon which some modern law writers and courts have expended (or wasted) a vast amount of learning without shedding upon it any appreciable degree of light." *Ohlson v. Sac County, etc., Ins. Ass'n*, 191 Iowa 479, 481, 182 N. W. 879, 880 (1921). "Appellant contends that the 'burden of proof did not shift'; that the only 'burden' that rested upon the appellant was the 'burden of producing evidence,' and the duty of going forward with its testimony to meet, or overcome, the *prima facie* case made by appellee. The discussion of 'presumptions of law,' 'presumptions of fact,' 'statutory presumptions,' 'burden of proof,' and 'burden of evidence' may be interesting, but it is not always fruitful in results." *Howard v. Chicago, B. & Q. R. R.*, *supra* note 14, at 1382, 195 N. W. at 155. One cannot help recalling how frequently have courts made light of problems which they found difficult to solve.

⁴⁵ See *Howard v. Chicago, B. & Q. R. R.*, *supra* note 14, at 1381, 195 N. W. at 154. The trial court instructed as follows: "But if you find by the greater weight or preponderance of the evidence that said fire was caused by the escape of fire or sparks from defendant's engine, then plaintiff would be entitled to recover unless you find by the greater weight or preponderance of the evidence that the defendant or its employees operating said engine were not guilty of negligence in any of the respects alleged in the petition." These instructions were entirely warranted in view of some of the previous decisions in the state. See *Stewart v. Iowa Central R. R.*, *supra* note 35; *German Ins. Co. v. Chicago & N. W. R. R.*, *supra* note 38. It would be impossible, it would seem, to instruct more accurately on presumption number three.

The court, on review, at 1387, 195 N. W. at 156, apparently saw little difference between this presumption and presumption number two, save in terminology, for after pointing out that "technically it is the 'burden of the evidence'" that devolves upon defendant rather than the "burden of proof," it concluded that

It is difficult for counsel to predict or for trial courts to instruct under such circumstances.

But now let it be assumed that the defendant offers clear and satisfactory evidence of due care, which evidence, in turn, is neither contradicted nor refuted by the plaintiff. The question is immediately presented whether the defendant is not now entitled to a ruling by the court in his favor.⁴⁶

The question is sometimes answered according to the presumption in force as to negligence. It is clear, however, that if the defendant is entitled to such a ruling under presumption number three, it follows, *a fortiori*, that he must have it under any of the other presumptions. The first objection to such a result is that the defendant, under the stronger presumption, has the burden of proving due care, and therefore cannot expect a ruling by the court in his favor. The objection to directing a verdict in favor of the party having the burden of proof, however, is untenable. There is no logical reason to prevent directed verdicts for parties having the affirmative of an issue as well as for parties who have initial presumptions in their favor, if the conditions warrant such a direction.⁴⁷

Especially is the result indicated above a rational one where the plaintiff's proof consists exclusively of the presumption. Nevertheless some courts have refused to direct for the defendant in railroad fire cases, insisting that the question was for the jury as it involved the credibility of witnesses.⁴⁸ It is regarded as a

while the instructions might have been "amplified" and "perhaps more happily and technically worded," still, it was not "such an erroneous statement of the rule of law applicable . . . that it misled the jury."

⁴⁶ For the purposes of this problem, "clear and satisfactory" evidence must be regarded as evidence which, if believed, completely rebuts the inference of negligence. Evidence merely "tending" to prove due care will not be sufficient. Thus, the mere fact that the locomotive was inspected before the trip raises no presumption of law that it was in proper condition during the trip. *Louisville & N. R. R. v. Malone*, 109 Ala. 509, 20 So. 33 (1896). It will be a question of fact, too, whether leaving near the track materials claimed to be combustible will amount to negligence. *Gibbons v. Wisconsin V. R. R.*, 66 Wis. 161, 28 N. W. 170 (1886).

⁴⁷ See *infra* note 80.

⁴⁸ *Great Northern Ry. v. Coats*, 115 Fed. 452 (C. C. A. 8th, 1902) (but with a strong dissenting opinion by Sanborn, J.).

case of conflicting evidence—the presumption on the one side and the defendant's rebutting evidence on the other.⁴⁹ The better cases, however, uphold the contrary doctrine and affirm the duty of the trial court to direct for the defendant under such circumstances,⁵⁰ an altogether sound result and one consistent with a rational theory of presumptions. When the evidence is undisputed, the questions of the amount and weight of such rebutting evidence are clearly questions of law.⁵¹ More especially is a direction by the court justified in the present problem, for the question of credibility is not so acute where the plaintiff's evidence consists exclusively of his initial presumption. Accordingly, Mitchell, J., observed:

"We do not think or hold that the mere fact that the fire was set by an engine has such an effect as direct evidence of negligence as would warrant a jury in finding negligence, if the otherwise uncontradicted evidence on the part of the railroad company showed satisfactorily that it had fully preformed its duty in the premises. And if a jury should so find, it would be the right and duty of the court to set aside the verdict, as in any other case where it was not justified by the evidence."⁵²

⁴⁹ See *Heimi v. Chicago G. W. R. R.*, *supra* note 43, at 28, 70 N. W. at 748.

⁵⁰ *Karson v. Milwaukee & St. P. R. R.*, *supra* note 36; *Menomonie River Sash & Door Co. v. M. & N. R. R.*, 91 Wis. 447, 65 N. W. 176 (1895); *Spalding v. Chicago & N. W. R. R.*, 33 Wis. 582 (1873). Where the presumption looks as though it were number two only, the same result must necessarily follow. See *Cronk v. Chicago, M. & St. P. R. R.*, *supra* note 30, at 100, 52 N. W. at 423, with which compare the effect of the presumption under statutes making railroads liable for killing stock on their rights-of-way, as in *Huber v. Chicago, M. & St. P. R. R.*, 6 Dak. 392, 396, 43 N. W. 819, 820 (1889), where it was said: "In the case at bar, the plaintiff having proved the killing, and the defendant having showed that it exercised proper care and precautions to prevent the injury—that it was not negligent—and the plaintiff offering no evidence tending to prove that the horse was in fact killed by defendant's negligence, there was nothing for the jury to determine, and the motion of defendant should have been granted." Also *Kentucky C. R. R. v. Talbot*, 78 Ky. 621 (1880); *Hodgins v. M. St. P. & S. S. M. R. R.*, 3 N. D. 382, 56 N. W. 139 (1893). And if the presumption in favor of the plaintiff is no more than number one, the result is beyond question. See *Southern R. R. v. Pace*, 114 Ga. 712, 713, 40 S. E. 723 (1902).

⁵¹ *Menomonie River Sash & Door Co. v. M. & N. R. R.*, *supra* note 50.

⁵² See *Karson v. M. & St. P. R. R.*, *supra* note 36, at 14, 15, 11 N. W. at 122, 123; *Great Northern Ry. v. Coats*, *supra* note 48, at 458 (dissent by Sanborn, J., containing a collection of cases and authorities).

When to this doctrine is added the principle that a court is required to direct a verdict in cases where, if a contrary one were returned, it would be compelled to set it aside,⁵³ the result commended above in railroad fire cases is undeniable.

The statutes fixing responsibility for fires in these cases have been differently interpreted in different states. In some states, for example, not only is a presumption of negligence raised, but the presumption is said to be "conclusive."⁵⁴ This means, of course, that there is really no presumption at all, because negligence is not a factor in the theory of liability. The statute practically makes railroads insurers against damage done by fire started from their locomotives. No evidence of due care should be admissible here, because it is irrelevant, and, if admitted, would surely confuse the jury on the issues before it.

Where the matter is actually one of presumption, it is seen that it is based upon the circumstance of the fire having originated with engines belonging to the company, the care and management of which were exclusively within its knowledge. It is not unjust to require the defendant to come forward and offer proof or actually prove due care. The difference in the presumption will determine the difference in the severity of the penalty for a failure to do so, or, to be more accurate, the difference in the penalty will determine what particular presumption is raised.

In Pennsylvania there is no statute affecting proof of negligence and the problem is controlled exclusively by the rules of the common law. The early cases in the state consistently held that there was no presumption whatever of negligence to aid the plaintiff in these actions.⁵⁵ Negligence must be proved and the burden was always on the plaintiff.⁵⁶ The defendant com-

⁵³ *Froling v. Howard*, 125 Me. 507, 131 Atl. 308 (1925); *Lavery v. Brigance*, 242 Pac. 239 (Okla. 1926).

⁵⁴ *Schaff v. Coyle*, *supra* note 6; 33 Cyc. 1327 (where a note states that Colorado, Connecticut, Missouri, Ohio, Rhode Island, South Carolina and Canada follow this strict rule of liability as a result of statute). Such statutes are constitutional. *Union P. R. R. v. DeBusk*, 12 Colo. 294, 20 Pac. 752 (1889).

⁵⁵ *Philadelphia & R. R. v. Yeiser*, 8 Pa. 366 (1848); *Philadelphia & R. R. v. Yerger*, 73 Pa. 121 (1873); *Albert v. Northern C. R. R.*, 98 Pa. 316 (1881).

⁵⁶ *Albert v. Northern C. R. R.*, *supra* note 55.

pany could usually be exculpated by showing that its engines were equipped with modern spark arresting apparatus.⁵⁷ As said by Read, J., in *Lackawanna R. R. v. Doak*:

"Railroad companies are authorized by law to use locomotives propelled by steam generated by burning wood, coal whether anthracite or bituminous, or any other ordinary fuel. The use, therefore, of fire with its necessary concomitants, is legal, and the limit imposed upon its use is that the latest improvements in its management in practical use should be applied to it."⁵⁸

There was no presumption or even permissible inference of negligence from the mere fact of fire.⁵⁹ Nor was the recurrence of fires in the same locality caused by the defendant's engines evidence of negligence.⁶⁰ But while modern cases in the state sound remarkably like the rule laid down in the old cases, it would be a mistake to conclude that the law has not undergone change. It is true that it is difficult to find fault with the logic of the *Doak* case. Mechanically⁶¹ it is impregnable. On the other hand, it is easy to understand how many of the western states evolved distinctly liberal rules, calculated to favor the basic industry of the locality—agriculture. Railroads could better stand the loss of destroyed crops and farm buildings than the farmers upon whom the prosperity of the state primarily rested. For similar reasons, no doubt, Pennsylvania adhered to strict requirements of proof of negligence. But as the protective attitude toward railroads has become less pronounced, the old rules have been moderated, not by legislative enactment, as in many cases in the West, but by the traditional common law agency, judicial decision and application.

⁵⁷ Trickett, *Liability of Railroad Companies for Negligently Caused Fires* (1908) 3 DICKINSON L. REV. 33, 48, *et seq.*

⁵⁸ 52 Pa. 379, 380 (1866).

⁵⁹ 1 WEIMER, PENNSYLVANIA RAILROAD LAW (1893) 706; *Jennings v. Pennsylvania R. R.*, 93 Pa. 337 (1879).

⁶⁰ *Philadelphia & R. R. v. Yeiser*, *supra* note 55.

⁶¹ *Cf. Pound, Mechanical Jurisprudence* (1905) 8 COL. L. REV. 605.

Thus it is not surprising to find, toward the latter part of the Nineteenth Century, less evidence required to carry the case to the jury on the question of negligence than previously. Hence, evidence of unusually large sparks being thrown out was sufficient to satisfy the judge that there was a jury question.⁶² Evidence of the accumulation of combustible materials along the right-of-way and of a fire appearing shortly after the passing of a train has been held sufficient.⁶³ The rule has been declared to be that the plaintiff must not only prove negligence but that he must prove negligence in the management of the particular locomotive that caused or could have caused the fire,⁶⁴ but if the specific engine cannot be identified it may be shown that other engines set fires or threw sparks for an equal distance within a reasonable period before or after the fire and in the same vicinity.⁶⁵ When once a verdict for the plaintiff has been obtained, by adhering strictly to the general principle of appeal that the most favorable inference possible will be indulged from the evidence to support the verdict, courts of appeal have helped to accomplish in their way what has been brought about elsewhere by more pronounced tinkering with the theory of proof.⁶⁶ In this way, Pennsylvania has modified the results of a strict application of the early doctrine. Still, however, the mere fact of fire and destruction of property alone can be said to raise no presumption of negligence, but added circumstances may be sufficient to make out a *prima facie* case (presumption number one), without direct proof of negligence.⁶⁷

⁶² *Lehigh V. R. R. v. McKeen*, 90 Pa. 122 (1879); *Philadelphia & R. R. R. v. Shultz*, 93 Pa. 341 (1880); *Van Stuben v. Central R. R. of N. J.*, 178 Pa. 367, 35 Atl. 992 (1896); *Thomas v. New York C. & St. L. R. R.*, 182 Pa. 538, 38 Atl. 413 (1897); *Byers v. Baltimore & O. R. R.*, 222 Pa. 547, 72 Atl. 245 (1909).

⁶³ *Elder Township School District v. Pennsylvania R. R.*, 26 Pa. Super. 112 (1904); *cf. Sollenberger v. Pennsylvania R. R.*, 290 Pa. 415, 139 Atl. 127 (1927).

⁶⁴ *Kalback v. Philadelphia & R. R. R.*, *supra* note 8; *Shelly v. Philadelphia & R. R. R.*, 211 Pa. 160, 60 Atl. 581 (1905).

⁶⁵ *Knickerbocker Ice Co. v. Pennsylvania R. R.*, 253 Pa. 54, 97 Atl. 1051 (1916); *Trickett*, *supra* note 57, at 57-59 ("identification" in Pennsylvania).

⁶⁶ *Sollenberger v. Pennsylvania R. R.*, *supra* note 63.

⁶⁷ "And it is also to be noted that cases which do not, in fact, touch the question of the presumption of negligence from the mere fact of the communica-

So it is seen that the rules of law governing the vital questions in these cases vary widely. The correct application of these rules is vital to a scientific litigation of such controversies. As to the correctness of the rules themselves, it must be recognized that there is involved no question of "right" or "wrong," in the traditional sense. It is solely a question of law-making, and, therefore, a question of making rules which are socially workable and which produce consequences that fairly represent the desires and meet the needs of the community.⁶⁸ The social theory to justify the rule of absolute liability, regardless of negligence, is obviously that of "social insurance" and of putting loss where it can most easily be carried and where it can be better distributed. The justification of the rules determining just what force the presumption of negligence will have (*i. e.*, what advantage it will carry for the plaintiff), while one of policy, is to be found in somewhat different considerations. Here it is a matter of convenience and workability in establishing liability. In every case, however, it is the final justification of the rule of law, in desirable consequences in the social order, that should furnish the criteria for judgment or for rationalization.

PRESUMPTION OF ORIGIN

To invoke a presumption of negligence, it is presupposed, of course, that the fire was started from sparks set out by the defendant's locomotives. This is not always easy to prove. Frequently, the only evidence at the plaintiff's disposal is that the fire occurred along or near the railroad right-of-way, and that, some time before, a train had passed. To overcome this difficulty, it is said that a presumption of cause is raised from certain circumstances from which it might reasonably be inferred

tion of fire are likely to be confused with adjudications directly upon this point. Thus in many cases the attendant circumstances shown by the evidence may be such as to raise a presumption of negligence, even though the bare fact that fire was communicated by the engine would not suffice for that purpose." Note (1906) 1 Ann. Cas. 812.

⁶⁸ Cf. Green, *Contributory Negligence and Proximate Cause* (1927) 6 N. C. L. REV. 1, 14; Bohlen, *supra* note 35, at 315, 316.

that the locomotive started the fires.⁶⁹ Thus it is declared that the fact that a locomotive passed over or near the place where the fire was discovered, and within a short time previous thereto, emitting sparks and cinders, is sufficient to raise a presumption of cause.⁷⁰ Now, the effect will again depend upon the kind and force of the presumption raised. If the presumption is number three, or number two, a failure by the defendant to offer proof will subject it to a directed verdict on the question of origin.⁷¹ A mere explanation or suggestion of other reasonable causes might satisfy presumption number two, but not number three. The defendant, under the lesser presumption, must merely cast doubt upon the issue. Until such rebutting evidence is offered, or until such explanation is given, the defendant is liable to a direction against him. The court may, under such circumstances, instruct the jury to find that the defendant's engines actually started the fire, which finding, in states where the strict rule of liability prevails and negligence is not a factor, would be sufficient to render the defendant liable.⁷²

It seems, however, that the accurate and generally conceded rule here is that proof of this type is to be regarded as affording the plaintiff merely a *prima facie* case that the defendant's engines

⁶⁹ JONES, EVIDENCE (3d ed. 1924) § 166. In *Sheldon v. Hudson River R. R.*, 14 N. Y. 218, 222 (1856), Chief Justice Denio said: "It was offered to be shown that a practice on the part of the company, which would have endangered this building, was indulged in about the time and near the place where the building was burned. That fact rendered probable to a certain degree that the injury was attributable to that cause, but it left it in the power of the defendants not only to controvert the evidence generally, but to show that the special facts applicable directly to the occurrence of the fire were such as to overcome the general inference from the plaintiff's evidence, and to avoid the presumption which that evidence created."

⁷⁰ *Gibbons v. Wisconsin V. R. R.*, *supra* note 46; *Thomason v. Kansas City S. R. R.*, 122 La. 995, 48 So. 432 (1909); *Nelson v. Chicago, B. & Q. R. R.*, 47 S. D. 228, 197 N. W. 288 (1924); *Missoula Trust & Savings Bank v. Northern P. R. R.*, *supra* note 28; *Stockdale v. Midland V. R. R.*, 113 Kan. 635, 215 Pac. 1021 (1923); *Missouri V. N. A. R. R. v. Philips*, 97 Ark. 54, 133 S. W. 191 (1910); *Goodman v. Lehigh V. R. R.*, 78 N. J. L. 317, 74 Atl. 519 (1909). Some of these cases had the additional element of a wind blowing in the direction of the plaintiff's property.

⁷¹ *Cf. Baltimore & Ohio R. R. v. Kreager*, 61 Ohio St. 312, 56 N. E. 203 (1899); *Atchison, T. & S. F. Ry. v. Gibson*, 42 Kan. 34, 21 Pac. 788 (1889).

⁷² *Cf. Baltimore & O. R. R. v. Kreager*, *supra* note 71, especially at 327, 56 N. E. at 204.

started the fire.⁷³ Thus the plaintiff is assured of getting to the jury if no rebutting evidence is introduced, and no verdict can be directed against him on the grounds that he has offered insufficient evidence to warrant a finding in his favor on the material issues.⁷⁴

Under such a rule, from the proved facts, there is a permissible inference of the defendant's causal connection with the fire that occasioned the damage. The jury is not required to so find, but it may so find if it sees fit. There is some evidence that the defendant's engines started the fire, and it is for the jury to say whether this evidence is convincing, that is, whether it is sufficient to sustain the burden of proof by a preponderance of the evidence, for the plaintiff is under this burden all through this phase of the case. If a finding is made for or against the plaintiff, it will not be disturbed, for the jury is free, so far as the law is concerned, to find either way.⁷⁵

It will not infrequently happen that the plaintiff will have an opportunity to invoke two presumptions which are available to assist him, and a failure to employ either may greatly prejudice his case. Suppose, in a state where proof of the accident throws the burden upon the defendant to prove due care (presumption number three), the plaintiff is able to show only that the defendant's engines passed across his lands, shortly before the fire, emitting quantities of sparks. What requests and instructions may he make upon such circumstantial evidence? Must he rely upon general principles pertaining to circumstantial evidence, or are there concrete and specific technical rules that he may employ? If the defendant offers no evidence whatever, obviously there is a jury case. If a general verdict is returned for the plaintiff, it will be upheld. In the first place, the jury was justified in find-

⁷³ *Greenfield v. Chicago & N. W. R. R.*, 83 Iowa 270, 49 N. W. 95 (1891); *Union P. R. R. v. DeBusk*, *supra* note 54; *St. Louis S. E. R. R. v. Trotter*, 89 Ark. 273, 116 S. W. 227 (1909); *Gulf C. & S. F. R. R. v. Meentzen Bros.*, 52 Tex. Civ. App. 416, 113 S. W. 1000 (1908).

⁷⁴ *Vaughn v. Director Gen. R. R.*, 218 Ill. App. 595 (1920).

⁷⁵ *Louisville & N. R. R. v. Malone*, *Gibbons v. Wisconsin V. R. R.*, both *supra* note 46.

ing that the defendant's engines started the fire, since the plaintiff had presumption number one to aid him. Having so found, the jury was then compelled to find that the fire resulted from the defendant's negligence, since the plaintiff had presumption number three to assist him here. Since the defendant produced nothing whatever to controvert or rebut the presumption, he must lose on the question of negligence, as a matter of law. Thus, the combination of the two presumptions assures the plaintiff of getting to the jury, and if he wins, insures him against reversal on appeal.⁷⁶ Counsel in such a case can do much to advance the interests of their cause by requesting accurate instructions which clearly differentiate the two issues and which carefully make clear to the jury the force of the presumption applicable to each.⁷⁷

It will be noticed that this situation does not constitute what is sometimes called a "presumption on a presumption." Here the second presumption is a legal consequence of the operative facts inferred from the evidentiary facts which establish the first presumption. The jury may find for the plaintiff on the question of origin. Now upon this finding the second presumption is raised, throwing the burden of showing due care upon the defendant.⁷⁸

Even if some evidence is offered by the defendant, requests for instructions should be made with analytical care. It may be, for example, that all the defendant's evidence goes to the issue of due care and none whatever to a denial that its engines started the fire. Since the presumption which the defendant must overcome as to negligence is far stronger and requires more proof

⁷⁶ *St. Louis S. E. R. R. v. Trotter*, *supra* note 73. Here the evidence showed that fire was discovered within fifteen or twenty minutes after the passing of a train the engine of which was emitting sparks. There was no other explanation of the fire. The court held that an inference was justified that the fire had been set out by the locomotive, and a presumption thereupon arose of the defendant's negligence, casting upon him the burden of proving due care. *Cf. Ganesville J. & S. R. R. v. Edmondson*, 101 Ga. 747, 29 S. E. 213 (1897); *Karson v. Milwaukee & St. P. R. R.*, *supra* note 36.

⁷⁷ *Cf. the apparent confusion of the two issues and the evidence as to each in Gulf C. & S. F. R. R. v. Meentzen Bros.*, *supra* note 73.

⁷⁸ Note how simple the problem becomes when handled by a competent court. *Wolff v. Chicago, M. & St. P. R. R.*, *supra* note 1.

than the presumption as to cause, the amounts of proof in each case necessary to overcome the plaintiff's advantage should be accurately distinguished.

On the other hand, there may arise a situation in which the defendant is entitled to a directed verdict. For example, he may present completely rebutting evidence as to origin. Since the presumption against him here was only number one, *viz.*, a "permissible inference" or what we designate as a *prima facie* case, evidence offering a satisfactory explanation of the fire together with at least some undisputed evidence tending to show another equally probable origin, would seem to entitle the defendant to a directed verdict, notwithstanding the so-called "presumption" in the plaintiff's favor. It must be remembered that no presumption of negligence is possible against the defendant until his responsibility for starting the fire is determined.⁷⁹

But if it is to overcome the presumption of negligence that the defendant's strong rebutting evidence is offered, the problem is different. Here the defendant has the burden of proving due care, which means that he must convince the jury by a preponderance of the evidence that he has not been negligent. If the mind is "left in equipoise," the defendant must lose. To sustain this burden, he offers strong and satisfactory rebutting evidence which is not disputed and which is not met by counter-rebutting evidence by the plaintiff. In other words, the plaintiff's evidence of negligence consists entirely of the presumption and the defendant has countered with strong and conclusive evidence of care which the plaintiff has not, in turn, met. It is a situation where the party under the burden of proof asks for a directed verdict upon evidence which is otherwise clear and convincing and not disputed or discredited. Clearly, in some jurisdictions, the defendant is entitled to a ruling by the court in his favor.⁸⁰ If the

⁷⁹ Cf. *Southern R. R. v. Myers*, 108 Ga. 165, 33 S. E. 917 (1899).

⁸⁰ The courts are divided here. See the discussion and authorities cited in Harper and Heckel, *supra* note 23, at 739-740. But the better authorities indicate that such may not only be done logically, but, under proper circumstances, it ought to be done. Sunderland, *Directing a Verdict for the Party Having the Burden of Proof* (1913) 11 MICH. L. REV. 198.

presumption against the defendant on the question of negligence is only number two, it follows, *a fortiori*, that he may have a directed verdict.

But let us suppose that the defendant can offer but slight evidence as to cause, showing possible explanations of the fire consistent with his own freedom from connection therewith, which, if any of them had existed, would negative his own responsibility. While it is true that the presumption against him is only number one, a *prima facie* case, still he cannot be said to have presented evidence of such weight as to warrant but one conclusion. Since reasonable minds might differ, depending upon which of the several hypotheses were adopted, the defendant can do no more than get to the jury. A directed verdict for him here is certainly error,⁸¹ except under the strictest requirements as to necessary circumstantial evidence to support a verdict for the plaintiff.⁸²

If his slight evidence goes, not to the issue of cause, but to the question of negligence, the defendant obviously has not sustained, as a matter of law, the burden of proof which was placed upon him by presumption number three. Thus, barring the application of the scintilla rule, he is liable to a directed verdict for the plaintiff. Such a slight quantum of evidence could not, under any circumstances, be regarded as sufficient to sustain the burden of proof, and, since the jury will not be permitted to return an irrational verdict, it may be instructed to return a reasonable one, which, in this situation, must necessarily be for the plaintiff.

Finally, if the evidence offered by the defendant is obviously more than a slight degree or scintilla, but falls short of being regarded as conclusively rebutting, there must be a verdict by the jury, both on the question of origin and of neg-

⁸¹ *Baltimore & O. R. R. v. Shipley*, *supra* note 5; *Kelley v. Wabash R. R.*, *supra* note 13.

⁸² See *supra* notes 4, 8.

ligence. A direction either way by the judge will be reversible error.⁸³

In Pennsylvania it has never been necessary to prove the fact of origin by direct evidence. Circumstantial evidence may

⁸³ To organize the various results suggested above, the following tables may be convenient. This presentation follows the plan employed by Harper and Heckel, *supra* note 23, at 746, 747. A word of caution may be necessary. It is not suggested that the various quanta of evidence can be ascertained with mathematical nicety. The approximations are only rough, and one classification will shade into another through imperceptible gradations. When once the proper classification is determined, however, the result should follow with scientific predictability.

ISSUE OF CAUSE			ISSUE OF NEGLIGENCE		
<i>Presumption Number One</i>					
Plaintiff's Proof	Defendant's Proof	Result	Plaintiff's Proof	Defendant's Proof	Result
1. Train passed shortly before fire	none	jury case	1. Defendant "caused" fire	none	jury case
2. Same	slight	jury case	2. Same	slight	jury case
3. Same	substantial	jury case	3. Same	substantial	jury case
4. Same	conclusive	direction for defendant	4. Same	conclusive	direction for defendant
			<i>Presumption Number Two</i>		
			1. Defendant "caused" fire	none	direction for plaintiff
			2. Same	slight	jury case
			3. Same	substantial	jury case
			4. Same	conclusive	direction for defendant, in absence of evidence in counter-rebuttal
			<i>Presumption Number Three</i>		
			1. Defendant "caused" fire	none	direction for plaintiff
			2. Same	slight	same
			3. Same	substantial	jury case
			4. Same	conclusive	direction for defendant, in absence of more evidence

No presumption stronger than presumption number one can be authoritatively justified from the mere fact of the passing of a train shortly before the discovery of the fire.

be sufficient.⁸⁴ For example, evidence that a locomotive set out a fire on both sides of a barn has been held evidence that it fired the barn.⁸⁵ Where there was an accumulation of rubbish along the right-of-way and an engine passed, emitting sparks, there was evidence, it was said, for the jury.⁸⁶ Consequently, Pennsylvania may be said to allow a presumption of origin from such facts as those above. Whether the mere passing of the train, alone, with no other attendant circumstance, is sufficient to raise such a presumption, may well be doubted.

CREDIBILITY OF WITNESSES

The courts are divided as to the rule respecting credibility of witnesses when the evidence is undisputed, and this allows of some deviation in the effect of the presumptions in railroad fire cases. There is no doubt about the province of the jury in determining credibility of witnesses and the weight to be attached to evidence when the testimony is conflicting. Some courts have carried this principle so far as to concede the jury arbitrary power to believe or disbelieve the witnesses when the testimony is uncontroverted,⁸⁷ but other cases hold that testimony which is undisputed, from witnesses who have not been discredited, cannot be disregarded. Juries will not be permitted to disbelieve witnesses arbitrarily or capriciously, when there is no rebutting testimony and nothing in fact or inference to impeach them. This, it is believed, is the better view.⁸⁸

Consequently, when undisputed evidence is offered to prove that the defendant's engines passed over or near the place where the fire was discovered shortly before the fire, emitting sparks in large quantities, this constitutes evidence which must be believed. Now where the effect of such evidence is to raise presumption

⁸⁴ *Knickerbocker Ice Co. v. Pennsylvania R. R.*, *supra* note 65; *Trickett*, *supra* note 57, at 34, *et seq.*

⁸⁵ *Philadelphia & R. R. v. Hendrickson*, 80 Pa. 182 (1876).

⁸⁶ *Stephenson v. Pennsylvania R. R.*, 20 Pa. Super. 157 (1902).

⁸⁷ See cases in DEC. DIG., *Evidence*, § 594.

⁸⁸ *Boe v. Lynch*, 20 Mont. 80, 49 Pac. 381 (1897); *Williams v. Cohn*, 201 Iowa 1121, 206 N. W. 823 (1926); *Inland Empire Candy Co. v. Grant Co.*, 138 Wash. 439, 245 Pac. 14 (1926); *Turner v. Gackle*, 168 Minn. 514, 209 N. W. 626 (1926).

number one, the jury may still reject the inference of origin. The jury cannot doubt that the train actually passed as testified, but it may refuse to draw the inference of origin from such fact or facts.

If, however, these facts establish presumption number two, thus casting upon the defendant the burden of offering testimony to throw doubt upon the inference, the conclusion is compelled in the absence of rebutting testimony, and the jury will be required to find that the defendant's engines did actually start the fire. Thus uncontroverted and unquestioned evidence of the passing of the train under such circumstances creates a situation entitling the plaintiff to a directed verdict, refusal to grant which will be error.

Similar situations are presented with respect to proving negligence. Where, as seems to be the case in many states where a presumption exists at all, proof of origin of the fire raises presumption number three, throwing the burden of proof upon the defendant, such evidence, if uncontroverted and undisputed, is sufficient to require, as a matter of law, a finding of negligence, and thus assure to the plaintiff a verdict.⁸⁹

DEFENSE

Due Care

Where the plaintiff's presumption of negligence on the part of the defendant is such as to cast upon him the burden of proving due care, the same becomes, of course, an affirmative defense which relieves the plaintiff of the necessity of pleading it although his theory of recovery is still one of negligence.⁹⁰

"When an injury has been occasioned by fire set out in the operation of a railroad, the presumption is that the corporation operating the railroad was guilty of negligence. . . . It is sufficient for the plaintiff in such cases to set forth simply its occurrence in his pleading. The allegation of negligence in plaintiff's petition was therefore redundant; for proof by him of such negligence was not essential

⁸⁹ See *supra* note 37.

⁹⁰ *Pittsburg, C. C. & St. L. R. R. v. Home Ins. Co.*, 183 Ind. 355, 108 N. E. 525 (1915); *St. Louis & S. F. R. R. v. Snaveley*, 47 Kan. 637, 28 Pac. 615 (1892); *Seska v. Chicago, M. & St. P. R. R.*, 77 Iowa 137, 41 N. W. 596 (1889).

to his right of recovery, and the fact that his pleading contained an unnecessary averment does not change the rule as to the *quantum* of proof he is required to make."⁹¹

Due care, as an affirmative defense, must thus be pleaded and proved by the defendant, with the burden on him to establish by the preponderance of the evidence the affirmative of the issue thus raised. It would seem, however, that where the presumption is anything less than number three, that is, when it is mere evidence of negligence which may or may not cast some lesser burden upon the defendant, negligence should be pleaded by the plaintiff to avoid a defective complaint.

Contributory Negligence

Contributory negligence is generally regarded as a defense, the burden of establishing which rests on the defendant,⁹² although some courts have held, in the absence of a statute, that the burden was upon the plaintiff to show his want of contributory negligence,⁹³ or, if he knew of the ignition of the fire, to show that he had employed all reasonable means to extinguish it.⁹⁴

What amounts to contributory negligence in these cases, by a failure to take proper precautions to prevent fires from railroad locomotives, will be determined by allowing the plaintiff to assume that the defendant will exercise due care. Owners of property along railroad lines will not be compelled to anticipate the railroad companies' negligence.⁹⁵

Under many statutes, especially in states where a strict liability is imposed upon railroads, contributory negligence is not a defense at all,⁹⁶ unless it is so gross as to be construed as

⁹¹ *Engle v. Chicago, M. & St. P. R. R.*, *supra* note 40, at 663, 37 N. W. at 8.

⁹² *Southern R. R. v. Patterson*, 105 Va. 6, 52 S. E. 694 (1906); *St. Louis, I. M. & S. R. R. v. Clements*, 82 Ark. 3, 99 S. W. 1106 (1907).

⁹³ *Wabash R. R. v. Miller*, 18 Ind. App. 549, 48 N. E. 663 (1897); *Louisville, N. A. & C. Ry. v. Carmon*, 20 Ind. App. 471, 48 N. E. 1047 (1898).

⁹⁴ See *Lake E. & W. R. R. v. Kiser*, 25 Ind. App. 417, 421, 58 N. E. 505, 506 (1900).

⁹⁵ *Leroy Fibre Co. v. Chicago, M. & St. P. R. R.*, 232 U. S. 340, 34 Sup. Ct. 415 (1914); *Wabash R. R. v. Miller*, *supra* note 93; *La Salle v. Central R. R.*, 73 Ore. 203, 144 Pac. 414 (1914).

⁹⁶ *Evins v. St. Louis & S. F. Ry.*, 104 Ark. 79, 147 S. W. 452 (1912); *Mathews v. Missouri P. R. R.*, 142 Mo. 645, 44 S. W. 802 (1897).

amounting to fraud.⁹⁷ Again, there are statutes in some jurisdictions which provide that the owner may use his property in the same manner and to the same extent as before the railroad was built over or near his land.⁹⁸ Such a rule obviously disposes of ordinary questions of contributory negligence. It was early decided in Pennsylvania that while farmers must assume all risks of the proper and careful use of the road,⁹⁹ they need not guard against the negligence of the railroad company.¹⁰⁰

Mitigating Circumstances

Although contributory negligence no longer presents a serious bar to recovery, as a complete defense, circumstances tending to mitigate damages are frequently introduced. This is permissible under the proper statutory plea, which is usually in the nature of a confession and avoidance.¹⁰¹ The issue thus raised may affect the plaintiff's necessary proof insofar as it concedes to him a *prima facie* case, but permits new matter to be introduced by the defendant to avoid liability. By this view such a plea concedes that the plaintiff is entitled to judgment but for the matters affirmatively alleged in the answer.¹⁰² It is said that

"under the codes the office of pleas in confession and avoidance is performed by defenses of new matter. A plea in confession and avoidance or of new matter in the nature of such a plea does not deny the allegations of the declaration, but in legal contemplation confesses them and seeks to avoid them by new affirmative matter. . . . A plea in confession and avoidance is necessary only when defendant proposes

⁹⁷ *Bowen v. Boston & A. R. R.*, 179 Mass. 524, 61 N. E. 141 (1901).

⁹⁸ See *Cleveland C. C. & St. L. Ry. v. Stephens*, 74 Ill. App. 586, 593 (1897).

⁹⁹ *Post v. Buffalo & W. R. R.*, 108 Pa. 585 (1885). "If a man stacked his flax so near to a railroad that it obviously was likely to be set fire to by a well-managed train, I should say that he could not throw the loss upon the railroad by the oscillating result of an inquiry by the jury whether the road had used due care." Holmes, J., partially concurring, in *Leroy Fibre Co. v. Chicago, M. & St. P. R. R.*, *supra* note 95, at 352-353, 34 Sup. Ct. at 418; see also cases cited in BOHLEN, *CASES ON TORTS* (2d ed. 1925) 508.

¹⁰⁰ *Philadelphia & R. R. v. Hendrickson*, *supra* note 85; cf. *Trickett*, *supra* note 57, at 59, *et seq.*

¹⁰¹ *Cain v. Osler*, 168 Iowa 59, 150 N. W. 17 (1914).

¹⁰² See 31 Cyc. 215, n. 55.

to admit the truth of a material allegation made by plaintiff, and to avoid liability thereon by affirmative proof of matters which destroy the effect of the allegations admitted."¹⁰³

Now since the party who has the affirmative of an issue ordinarily has the burden of proof,¹⁰⁴ manifestly the defendant who thus seeks to avoid liability in whole or in part ¹⁰⁵ must sustain this burden by a preponderance of the evidence. The general rule of pleading is applicable here, and matters in mitigation must be established by the defendant.¹⁰⁶

CONCLUSION

It is apparent, then, that the most favorable situation for the plaintiff in proving liability of railroads for damages by fires, is one which raises the strongest presumptions in his favor. If he can furnish evidence of the discovery of the fire along or near the right-of-way shortly after the passing of a train, especially if the locomotive was emitting sparks, he will usually have a *prima facie* case as to the question of origin. When he has any kind of presumption to aid him on the question of negligence, he has, on the whole matter of liability, a case for the jury.

If the presumption of origin is number two or number three, and if negligence is not a factor in the case, he will win by a ruling by the judge unless the defendant is able to rebut, by some evidence, the question of cause. If both presumptions should happen to be number three, the plaintiff would win by a directed verdict unless the defendant presented a substantial amount of evidence on at least one issue. Where the presumption as to origin is number one and the presumption as to negligence number three, the plaintiff should carefully analyze the defendant's evidence, and request accurate instructions as to the effect of each mass of evidence.

¹⁰³ 31 Cyc. 215.

¹⁰⁴ 16 Cyc. 928, *et seq.*

¹⁰⁵ Although a plea in confession and avoidance at common law had to set up matters which, if true, would constitute a complete defense, under the codes mitigation is ordinarily available as a partial defense. See 31 Cyc. 217.

¹⁰⁶ *Wells v. Pike*, 31 Mo. 590 (1862); *Gillson v. Price*, 18 Nev. 109, 1 Pac. 459 (1883).

In every case, it is imperative that the plaintiff know exactly his problem as to the amount of evidence necessary to establish the respective elements of his case, and the amount necessary for his adversary to meet it, for it is only in this way that he can take full advantage of his privilege to invoke the ruling of the court to successfully terminate the suit, and lay substantial grounds for appeal, or protect himself on appeal by the defendant. Much the same problems face the defendant if it is to avail itself of the law during the course of the trial.

In Pennsylvania, where there is no presumption of negligence at all, and where the presumption of origin is number one upon certain combinations of circumstances, it is the defendant who will most frequently have an opportunity to invoke a favorable ruling from the court by taking advantage of the general presumption in his favor which puts upon the plaintiff at every state of the lawsuit the burden of proof as to both origin and negligence. As observed, however, both trial and appellate courts are constantly reducing this advantage to the defendant in this type of litigation, by relaxing the requirements upon the plaintiff regarding his *prima facie* case, and thus, in fact, creating situations which practically amount to presumption number one on both the question of negligence and of cause.